(1) Supreme Court, U.S.
F I L E D

No. 94-941422 FEB 23 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

JOHN W. MARTIN, *et al.*,

Petitioners,

v.

ROBERT K. WILKS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard T. Seymour
Sharon R. Vinick
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1450 G Street, NW
(Suite 400)
Washington, DC 20005
(202) 662-8350

Susan W. Reeves
714 29th Street South
Birmingham, AL 35233
(205) 322-6631

ROBERT D. JOFFE
Counsel of Record

Rowan D. Wilson
Michelle K. Jacobs
Karin J. Dell'Antonia
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Counsel for Petitioners
John W. Martin, *et al.*

February 23, 1995

39pp

QUESTIONS PRESENTED FOR REVIEW

1. Can reverse discrimination plaintiffs rely on the results of unlawful selection criteria to prove job entitlement?
2. Is it unlawful for the rate at which promotional relief is provided to exceed the percentage of minorities in the position from which the promotions are made?
3. Is the achievement of a racially balanced work force an unconstitutional goal as a remedy for egregious discrimination by an employer?
4. When race-conscious remedial relief is justified under Title VII and the Equal Protection Clause, are non-minorities' rights trammelled by a 7-9 month promotional delay?
5. Do the Equal Protection Clause and Title VII require a public employer faced with a compelling interest in implementing affirmative action to limit any such relief in a consent decree to slow, prolonged relief, instead of effective, shorter-lived relief?
6. May a court of appeals disregard the facts found by the district court, which has presided over this and related litigation for 20 years, and construe the record—including the operation of consent decrees entered and supervised by the district court—on a de novo basis?

PARTIES TO THE PROCEEDINGS BELOW

Defendant-Intervenors
(Petitioners here)

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

Defendants

Richard Arrington, Jr.
Roderick Beddow, Jr.
City of Birmingham, Alabama
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
Jefferson County Personnel Board
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Plaintiffs

James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
Dudly L. Greenway
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Kenneth O. Ware
Phillip H. Whitley
Marshall G. Whitson
Robert K. Wilks
David H. Woodall

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	10
I. THE ELEVENTH CIRCUIT OVERTURNED A REMEDIAL AFFIRMATIVE ACTION PLAN THAT WAS VALID UNDER THIS COURT'S SETTLED PRECEDENTS	11
A. The Target Rate of Promotions May Be Set at a Fixed Percentage that Exceeds the Percentage of Minority Workers in the Entry Level Pool in Order to Accelerate the Relief and the Termination of Affirmative Action	11
B. The Achievement of a Racially Balanced Workforce is not an Unconstitutional Goal as a Remedy for Egregious Discrimination	13

Page

II. THE ELEVENTH CIRCUIT'S DEFINITION OF WHAT "UNNECESSARILY TRAMMELS" THE RIGHTS OF NON-MINORITIES IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND UNJUSTIFIABLY LOWERS THE BURDEN OF PROOF FOR REVERSE DISCRIMINATION PLAINTIFFS 15

A. The Eleventh Circuit's Error in Granting Relief Where Respondents' Only Claim of Job Entitlement Was Based on an Unlawful Selection Process Undermines All Affirmative Action 15

B. A Slight Promotional Delay Does Not Unnecessarily Trammel the Rights of Non-Minorities and is Narrowly Tailored 17

C. Narrow Tailoring Does Not Require an Employer to Attempt Slower, Less Effective Remedies Rather than Effective Remedies that Terminate Sooner 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases	Page(s)
Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) (en banc)	12 and n.10
Anderson v. Bessemer City, 470 U.S. 564 (1985)	19 n.12, 24
Bennett v. Arrington, 806 F. Supp. 926 (N.D. Ala. 1992), *rev'd sub nom. In re Birmingham Reverse Discrimination Empl. Litig.*, 20 F.3d 1525 (11th Cir. 1994)	1, 9 and n.8, 18, 26
City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989)	14 n.11
Davis v. City and County of San Francisco, 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, 498 U.S. 897 (1990)	14
Edwards v. City of Houston, 37 F.3d 1097 (5th Cir. 1994)	15
Ensley Branch, NAACP v. Seibels, 14 Fair Empl. Prac. Cas. (BNA) 670 (N.D. Ala. 1977), *aff'd in part, rev'd in part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980)	4, 14, 16, 27
Ensley Branch, NAACP v. Seibels, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980)	16, 28
Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994)	6 n.4, 7 n.5, 13, 26
Fullilove v. Klutznick, 448 U.S. 448 (1980)	28

Page(s)

Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987), *cert. denied*, 490 U.S. 1051 (1989) 14, 22 n.16

Howard v. McLucas, 671 F. Supp. 756 (M.D. Ga. 1987), *aff'd*, 871 F.2d 1000 (11th Cir.), *cert. denied*, 493 U.S. 1002 (1989) 26 n.21

Howard v. McLucas, 871 F.2d 1000 (11th Cir.), *cert. denied*, 493 U.S. 1002 (1989) 22 n.16, 24, 27 n.25

Hutto v. Finney, 437 U.S. 678 (1978) 19 n.12

In re Birmingham Reverse Discrimination Empl. Litig., 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. 1985), *rev'd*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989) ..... *passim*

In re Birmingham Reverse Discrimination Empl. Litig., 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989) 9

In re Birmingham Reverse Discrimination Empl. Litig., 20 F.3d 1525 (11th Cir. 1994) ..... *passim*

Johnson v. Transportation Agency, 480 U.S. 616 (1987) ..... *passim*

Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) ..... 10 and n.9, 12, 17, 29

Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 26 n.21

	Page(s)
Martin v. Wilks, 490 U.S. 755 (1989)	9, 11
Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 112 S. Ct. 748 (1992)	18 n.12
Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1948 (1992)	13, 14, 28
United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1983)	2, 5, 12, 18, 26
United States v. Jefferson County, No. CV 75-P-666-S (N.D. Ala. entered May 21, 1991); *aff'd sub nom. Ensley Branch, NAAPC v. Siebels*, 31 F.3d 1548 (11th Cir. 1994)	7, 18, 25
United States v. Jefferson County, No. CV 75-P-666-S (N.D. Ala. entered September 25, 1991); *aff'd sub nom. Ensley Branch, NAACP v. Siebels*, 31 F.3d 1548 (11th Cir. 1994)	25
United States v. Paradise, 480 U.S. 149 (1987)	*passim*
United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979)	*passim*
Walker v. City of Birmingham, 388 U.S. 307 (1967)	2
Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)	10 n.9, 21

Page(s)

Statutes, Rules and Regulations

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

No. 94-

IN THE

Supreme Court of the United States

October Term, 1994

JOHN W. MARTIN, *et al.*,

Petitioners,

v.

ROBERT K. WILKS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John W. Martin, *et al.*, respectfully petition for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *In re Birmingham Reverse Discrimination Empl. Litig.*, 20 F.3d 1525 (11th Cir. 1994) (*"BRDEL Appeal II"*) and is reprinted in the Appendix to this petition at A2. The opinions of the United States District Court for the Northern District of Alabama are reported as *Bennett v. Arrington*, 806 F. Supp. 926 (N.D. Ala. 1992); *In re Birmingham Reverse Discrimination Empl. Litig.*,

39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. 1985) ("BRDEL"); and *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1983) and are reprinted in the Appendix to this petition at A52, A65 and A106.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1994. The Court of Appeals denied petitioners' petition for rehearing on November 25, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

The relevant constitutional and statutory provisions are set forth in the Appendix to this petition at A1.

STATEMENT OF THE CASE

1. *The Litigation Leading to the Decree.* This controversy arises from the City of Birmingham's (the "City") infamous and prolonged record of discrimination against blacks in public employment. The positions at issue in this litigation principally concern the Birmingham Fire and Rescue Service (the "BFRS"), which, like the City workforce in general, remained virtually all-white until the 1980s. By law, blacks could not apply for BFRS jobs until the mid-1950s. 1985 DX 1982-84.[1] Given the role of the BFRS in attacking "civil rights protestors . . . [with] firehoses", *Walker v. City of Birmingham*, 388 U.S. 307, 325 n.1 (1967) (Warren, C.J., dissenting), it is hardly surprising that the BFRS did not hire a black until 1968, and filled 147 consecutive vacancies with whites before hiring its second black four years later. 1979 PX 28 at 3; 1979 PX 28 at 5, PX 1 at 121-24. By 1976, only 8 of 437 Firefighters (1.8%) were black. 1979 PX 1 at 117-26. Until the promotions challenged by respondents

---

[1] Defendants' Exhibits from the 1979, 1985 and 1991 trials are cited as 19XX DX XX; Plaintiffs' Exhibits are cited as 19XX PX XX and the transcripts from those trials are cited as 19XX Tr. XX. The record is cited as RXX-XX-XX.

occurred in 1982, no black had ever held a supervisory position in the BFRS. 1991 PX 11 at 51.

In January 1974, private plaintiffs filed two lawsuits against the City: *Ensley Branch, NAACP v. Seibels*, No. CA-74-2-12-S (N.D. Ala. filed Jan. 4, 1974), and *Martin v. City of Birmingham*, No. CA-74-Z-17-S (N.D. Ala. filed Jan. 7, 1974). Those cases alleged long-standing, pervasive discrimination against blacks in virtually all aspects of employment and sought injunctive relief and back pay.

On August 30, 1974, the United States advised the City and the Personnel Board of Jefferson County (the "Board") of its finding that the City and Board had "engaged in a pattern and practice of discriminatory employment practices with adverse impact on blacks and females". 1991 DX 84 at 1. The United States found that in City employment "blacks are generally in lower paying unclassified jobs while whites are in the higher paying classified jobs" and that:

> The assignment patterns revealed in these statistics are, according to our information, the results of a policy of hiring blacks for low paying, less desirable jobs, and imposing requirements for assignments or promotions to higher paying jobs which operate to disqualify disproportionate numbers of black applicants, but which have not been shown to be predictive of nor necessary for successful job performance.

Id. at 2.[2] The United States demanded that the City sign a consent decree requiring *inter alia*: "the hiring of blacks and females *on an accelerated basis* in order to overcome the present effects of past discrimination." *Id.* at 4 (emphasis added).

---

[2] In 1974, only 175 of the City's 2,417 classified employees, or 4%, were black, 1976 PX 4 at 1-7, while the City's unclassified work force was approximately 75% black. 1985 PX 23 at 3. Unlike classified employees, unclassified employees have "no tenure of employment . . . no upward mobility . . . [and] do not participate in many of the base benefits" afforded to classified employees. 1979 PX 32 at 118.

In May 1975, the United States sued the City, the Board and others, *United States v. Jefferson County*, No. CA-75-P-666-S (N.D. Ala. filed May 27, 1975), alleging systematic discrimination against blacks and women in employment, including hiring and promotion. The United States challenged the use of "qualifications, tests, and other selection standards" for hiring and promotion that had an adverse impact on blacks and women and that had "not been shown to be predictive of successful job performance". *Id.* at 5-6. The United States sought extensive injunctive relief, including procedures and an order requiring the City to hire qualified black and female applicants in sufficient numbers to overcome the effects of past discrimination. *Id.*

After trial in 1976, limited to the issue of entry-level fire and police department testing, the district court found that the entry-level Firefighter and Police Officer tests were unlawful because they had an adverse impact on blacks and were not job-related. *Ensley Branch, NAACP v. Seibels*, 14 Fair Empl. Prac. Cas. (BNA) 670, 685 (N.D. Ala. 1977), *aff'd in pertinent part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980). In 1979, the district court held a second trial concerning numerous other employment and promotional practices used by the City and the Board. The United States and private plaintiffs presented evidence for a multitude of job classifications, including those in the BFRS and Engineering department, demonstrating that the City and the Board discriminated against blacks and women not only by failing to hire them, but also by failing to promote them once hired. *See, e.g.*, 1979 PX 28 at 4; 1979 Tr. 639-40; 1979 PX 29 at 6-7, PX 70 at 7.[3]

---

[3] For example, the 1979 trial evidence established that most of the few black Firefighters in the BFRS were ineligible to take the promotional examination because of lack of seniority, and that the all-white BFRS officers assigned failing promotional potential ratings to blacks (thus preventing them from taking the promotional examination) almost four times more frequently than to whites, a pass/fail differential statistically significant at the .0001 level. 1979 PX 70 at 7.

When the City began settlement negotiations with the United States in 1980, it had been confronted at two trials with extensive evidence of its discrimination. After negotiating for more than a year and considering many alternatives, the parties agreed to settle the litigation by entering into two consent decrees. The consent decree with the City (the "Decree") established long-term goals for blacks and women in all job classifications in the City service and annual hiring or promotional goals for roughly one-fifth of City job classifications. All goals were explicitly made "subject to the availability of qualified applicants." Decree ¶¶ 5-8, 9b, 10b (the Decree is set forth in the Appendix at A118).

On August 3, 1981, after broad public notice, the district court held a fairness hearing at which the United States reaffirmed its judgment that "under Supreme Court decisions and relevant Fifth Circuit law [ ] the provisions of the decree, including the affirmative hiring and promotion of relief, are lawful and proper." 1985 DX 1431 at 40. Several persons filed written objections to the Decree and appeared at the hearing. Among them was the Birmingham Firefighters Association, to which all 14 firefighter respondents belonged, and which was represented by the same counsel who has represented respondents throughout this litigation. R11-23-43; R13-318-3.

On August 21, 1981, the district court entered the City and Board Decrees and issued an opinion explaining its basis for doing so. *Jefferson County*, 28 Fair Empl. Prac. Cas. 1834. The court noted, based upon substantial and wide-ranging evidence demonstrating discrimination by the Board and the City against blacks and women:

> it can hardly be doubted that there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments and for discrimination against women at all levels in those departments.

Id. at 1838. The court concluded that "[t]he settlement represents a fair, adequate and reasonable compromise of the

issues between the parties to which it is addressed and is not inequitable, unconstitutional, or otherwise against public policy." *Id.* at 1839. The court found that the absence of blacks and women in promotional positions in City employment was "a natural consequence of discrimination against blacks at entry-level positions." *Id.* at 1838.

2. *Structure and Implementation of the Decree.* For each position in the BFRS, the Decree established a long-term goal of the employment of blacks "in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census." Decree ¶ 5. This set the long-term goal at 28%. *Id.*[4] To achieve that goal, the Decree set annual percentage promotional goals for roughly one-fifth of all City job classifications. For Fire Lieutenant, the annual goal was set at 50% black. *Id.* at ¶ 6. For Fire Captain (and Battalion Chief), the annual goal was set at "twice the black percentage representation in the job classifications from which promotional candidates are traditionally selected for those jobs." *Id.* at ¶ 8. The Decree did not obligate the City to meet those annual goals, but rather to "attempt to achieve" or "seek to achieve" them. *Id.* at ¶¶ 6, 8. The Decree required that "subject to the availability of qualified black candidates", the City promote blacks to two of the next four Lieutenant vacancies and to one of the next two Captain vacancies. *Id.* The Decree further provided for the termination of the annual percentage goal for a job classification once the long-term goal for that job was achieved or the Decree was modified.[5] *United States v. Jefferson County*, No. CV

---

[4] Paragraph 5 of the Decree explicitly permitted the City to alter the long-term goal for any job category in which specialized education or experience was necessary. Decree ¶ 5; *see Ensley Branch, NAACP v. Siebels*, 31 F.3d 1548, 1557 (11th Cir. 1994).

[5] By its terms, any party to the Decree could move to modify it six years or more after its entry. *Id.* at ¶ 55. On May 2, 1990, the United States moved to modify the Decree; thereafter, the district court granted limited intervention to classes of white male, black and female employees and prospective employees. After an evidentiary hearing, the district court

75-P-666-S (N.D. Ala. entered May 21, 1991), reprinted in the Appendix at A166, A177. In fact, the 50% annual goal for Fire Lieutenant terminated in early 1989, when 28% of BFRS Fire Lieutenants were black.

Prior to the Decree, the BFRS did not compare the qualifications of any promotional candidates, but promoted individuals in rank order according to the Board's certification lists, which were based on a combination of test scores and seniority points. *BRDEL*, 39 Fair Empl. Prac. Cas. at 1437 ¶ 16, 1438 ¶ 25. The only material change in BFRS hiring and promotion practices caused by the Decrees was that instead of promoting in rank order from Board certification lists based on test scores and seniority, which historically were composed almost entirely of white male candidates, the BFRS received separate lists from the Board containing eligible black, white and female candidates, from which it selected promotees consistent with its obligation to attempt to meet the Decree's goals. *Id.* at 1437 ¶ 17.

As the district court found, rank-order certification is not related to job performance and has demonstrable adverse impact. *Id.* at 1434 ¶54, 1440 ¶ 59, 1443-44 ¶ 96. Those findings have never been disturbed by an appellate court. Therefore, since entry of the Decree, the City has been hiring and promoting from lists of persons certified by the Board as qualified, without regard to spurious rank-order information. In practice, the City's post-Decree promotion practices have afforded substantial opportunities to white males, though necessarily less than those they enjoyed under the

---

modified the Decree in certain respects by orders entered May 21, 1991, and September 25, 1991. Those orders and the accompanying opinions are set forth in the Appendix at A116 and A181. The orders were reviewed by the Eleventh Circuit and affirmed, reversed, vacated and remanded in various parts. *Ensley Branch*, 31 F.3d 1548. The Eleventh Circuit also directed the district court to set deadlines for the development of valid selection procedures and to determine whether the effects of past City and Board discrimination persist to justify continued affirmative action. *Id.* at 1571-79.

discriminatory regime in place prior to Decree's adoption. *See infra* at pp. 23-24. The vast majority of white males have been promoted with little or no delay over what would have happened absent the Decree; the average Decree-based delay of all white males who have taken, passed, and scored well enough on promotional exams in the BFRS to be promoted strictly according to rank order is approximately seven and one-half months. *See infra* at pp. 19-20. In fact, all but one of the 14 firefighter respondents were promoted by 1988. 1991 DX 1-2.[6]

3. *The Reverse Discrimination Litigation.* In 1982, immediately following the promotion of the first black Fire Lieutenant in BFRS history, "passed over" while males in the BFRS and the City Engineering Department filed lawsuits against the City and the Board, claiming the promotion of blacks constituted reverse discrimination.[7]

Seven black plaintiffs in the original employment discrimination lawsuits against the City (the "Martin Intervenors") intervened to defend the lawfulness of the Decree, as they (and the United States) were obligated to do as signatories to the Decree. *See* Decree ¶ 3. In defending those reverse discrimination claims, the City and the Board acknowledged that they made race-conscious decisions, as contemplated by the Decree, but denied that they had violated Title VII or the Equal Protection Clause. Both contended that respondents were bound by the Decree and that the promotions were lawful because they were made pursuant to the Decree.

---

[6] One respondent, Ronnie Chambers, was eligible for promotion to Fire Lieutenant only for 6 weeks. He never again scored high enough to be certified for rank order promotion, even had no blacks ever again been promoted by the City. 1991 DX 1-2.

[7] *Bennett v. Arrington*, No. CV-82-P-0850-S (N.D. Ala. filed April 14, 1982); *B.A.C.E v. Arrington*, No. CV-82-P-1852-S (N.D. Ala. filed August 30, 1982); *Garner v. City of Birmingham*, No. CV-82-P-1461-S (N.D. Ala. filed July 1, 1982); *Wilks v. Arrington*, No. 83-AR-2116-S (N.D. Ala. filed March 21, 1983); *Zannis v. Arrington*, No. CV-83-P-2680-S (N.D. Ala. filed November 7, 1983); and *Howard v. City of Birmingham*, No. CV-83-P-3010-S (N.D. Ala. filed December 15, 1983).

In December 1985, after a week-long trial on fourteen promotions of blacks to Fire Lieutenant and Fire Captain and one promotion to Civil Engineer, the district court rejected respondents' claims, holding that the claims were impermissible collateral attacks on the Decree and that the remedial measures provided by the Decree—including the challenged promotions—were lawful. *BRDEL*, 39 Fair Empl. Prac. Cas. 1431. On appeal, the Eleventh Circuit reversed and ordered a retrial, holding that because respondents were not parties to the Decree, they could not be collaterally estopped from attacking the Decree. *In re Birmingham Reverse Discrimination Empl. Litig.*, 833 F.2d 1492 (11th Cir. 1987) ("*BRDEL Appeal*"). This Court affirmed. *Martin v. Wilks*, 490 U.S. 755 (1989).[8]

In October 1991, the district court held a second trial on the same fifteen promotions tried in 1985. *Bennett*, 806 F. Supp. 926. The parties supplemented the 1985 trial record with evidence concerning the City's basis for entering the Decree, the Decree negotiations, and the effect of the Decree upon racial representation in the BFRS. On August 14, 1992, the district court denied respondents' claims and ruled that the failure to promote the 15 respondents did not violate the Constitution or Title VII, and that the Decree provided a complete defense to respondents' reverse discrimination claims.

Respondents appealed that decision; on May 4, 1994, the Eleventh Circuit overturned it. Although holding that the City had a compelling governmental interest in redressing past discrimination, the Eleventh Circuit held that the Decree was unlawful under Title VII and the Equal Protection Clause. *BRDEL Appeal II*, 20 F.3d 1525. Despite the lack of evidence that respondents rather than the blacks in question would have been promoted in a non-discriminatory regime, the Eleventh Circuit accepted respondents' claims that blacks were promoted to positions to which respondents were entitled. The only evidence of entitlement shown by respondents was based on the

---

[8] The district court's 1985 findings of fact "were not set aside on the appeal and under the law of the case remain as determinations." *Bennett*, 806 F. Supp. 927 n.2.

previous discriminatory system, under which white males received all the promotions. *See infra* at pp. 15-17.

In reversing the district court, the Eleventh Circuit did not attempt to balance the admittedly compelling interest in redressing past discrimination against the actual impact of the Decree on nonminorities. Instead, it ignored the evidence showing that nonminorities had been insignificantly burdened in practice, and found the Decree unlawful for three reasons based on the technical construction of the Decree: first, the 50% annual promotional goal for Fire Lieutenant was "arbitrary" and "wooden" because it was not tied to the percentage of black Firefighters; second, less restrictive goals may have provided some relief; and third, the goal of achieving a racially balanced workforce is unconstitutional.

REASONS FOR GRANTING THE WRIT

This case presents several broad issues of national importance concerning race discrimination in employment, affirmative action, and reverse discrimination. The Eleventh Circuit's decision disregards or misinterprets several of this Court's prior decisions, including *Paradise*, *Weber*, *Johnson*, *Wygant* and *Sheet Metal Workers*,[9] and conflicts with the law of other circuits. Equally important, the Eleventh Circuit's decision severely undermines affirmative action by establishing several illogical and unprecedented rules: that reverse discrimination plaintiffs are entitled to the continuation of racial discrimination in their favor; that relatively minor delays in promotions—without layoffs or demotions—unduly trammel the rights of nonminorities; and that the Constitution and Title VII forbid quick relief and favor slow relief that prolongs the duration of affirmative action.

---

[9] *United States v. Paradise*, 480 U.S. 149 (1987) (plurality op.); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).

Both the district court and the Eleventh Circuit agreed that Birmingham faced a compelling need to redress its own employment discrimination. Indeed, when the Decree was entered, Birmingham had never had a single black person in any of the nearly 150 promotional positions in its fire department. Nevertheless, the Eleventh Circuit has held that the very first promotions of black firefighters in the history of Birmingham violate the Constitution and Title VII. This Court previously considered this case important enough to hear on a procedural issue. *Martin*, 490 U.S. 755. Now, it comes before the Court on crucial substantive issues of affirmative action. The standards created by the Eleventh Circuit put at risk affirmative action programs previously thought to be lawful that redress egregious prior discrimination. This Court should grant certiorari to reverse the Eleventh Circuit's crippling decision.

I. THE ELEVENTH CIRCUIT OVERTURNED A REMEDIAL AFFIRMATIVE ACTION PLAN THAT WAS VALID UNDER THIS COURT'S SETTLED PRECEDENTS.

A. The Target Rate of Promotions May Be Set at a Fixed Percentage that Exceeds the Percentage of Minority Workers in the Entry Level Pool in Order to Accelerate the Relief and the Termination of Affirmative Action.

The Eleventh Circuit held that the 50% promotional goal for Fire Lieutenant is unlawful because it "is completely uninfluenced by the percentage representation of blacks in the firefighter ranks" and "appears entirely arbitrary". *BRDEL Appeal II*, 20 F.3d at 1542. In *Paradise*, 480 U.S. at 179, this Court reviewed and rejected an identical argument:

> The Government suggests that the one-for-one [promotional] requirement is arbitrary because it bears no relationship to the 25% minority labor pool relevant here. This argument ignores that the 50% figure is not itself the goal; rather it represents the speed at which the goal of 25% will be achieved.

See also Weber, 443 U.S. at 208-09 (upholding lawfulness of accelerated interim goals that "end as soon as the percentage of black skilled craftworkers . . . approximates the percentage of blacks in the local labor force"); *Sheet Metal Workers*, 478 U.S. at 450 ("A district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures."); *Aiken v. City of Memphis*, 37 F.3d 1155, 1164-1165 (6th Cir. 1994) (*en banc*) (A 20% minimum promotional goal unrelated to the relevant labor pool "is merely a means of speedily realizing the long-term goals of the Decrees. And the result realized in *Paradise* makes clear that it is a permissible means of realizing those goals."). Here, as in *Paradise*, the 50% promotional goal was designed to hasten the day on which the goals themselves would terminate and in fact did so.[10]

The district court found that the City's pool of Firefighters was tainted by past discrimination, rendering it unfit as a basis for determining the proper composition of BFRS promotional positions. *Jefferson County*, 28 Fair Empl. Prac. Cas. at 1837-38. Indeed, that conclusion is incontrovertible given the earlier finding—now law—that the entry-level tests were unlawful. Utterly ignoring that finding, the Eleventh Circuit invalidated the Decree's 50% promotional goal because "it is imperative"

---

[10] The Eleventh Circuit improperly attempted to limit *Paradise* to court-ordered affirmative action intended to combat a long-term defiance of court orders to develop non-discriminatory practices. *BRDEL Appeal II*, 20 F.3d at 1543. That limitation both misreads *Paradise* and subverts its intent. First, *Paradise* contains no such limitation; nor is there any reason to believe that its rationale—hastening the elimination of the effects of discrimination and the swift movement to a race-neutral system—is not equally served in situations where voluntary affirmative action is undertaken to avert a judicial determination of liability. *Aiken*, 37 F.3d at 1164-65. Second, not only did the City exclude blacks from the BFRS by law, 1979 PX 7 at 47; 1985 DX 1982-84, DX 1986, DX 1988, and DX 1991, but both before and after the Decree was entered, white supervisors discriminated against blacks in evaluation, training, distribution of assignments and employment conditions. 1979 PX 70 at 7, PX 37 at 146-57, PX 39; 1985 Tr. 496, 858, 866-70, 877-80, 953-54. The employment history of the BFRS demonstrates a far more steadfast, deep-rooted culture of discrimination than that present in *Paradise*.

that any lawful promotional goal "be related in some reasonable manner to the representation of blacks among firefighters." *BRDEL Appeal II*, 20 F.3d at 1543. Not only does that holding misconstrue the nature of an interim annual goal, *see infra* at pp. 17-25, but it also conflicts with this Court's recognition that a feeder position is *not* the relevant labor pool if that pool is tainted by past discrimination. *See Paradise*, 480 U. S. at 168 (plurality op.); *Weber*, 443 U.S. at 214 (Blackman J., concurring). *See also Ensley Branch*, 31 F.3d at 1577 (analyzing the Decree at issue here; holding that affirmative action may lawfully adjust for a labor pool tainted by past discrimination); *Stuart v. Roache*, 951 F.2d 446, 452-453 (1st Cir. 1991) (Breyer, J.) ("Obviously, if few blacks become police officers, few will become sergeants . . . [i]ndeed, litigated court findings of recent entry-level discrimination would seem sufficient to justify race conscious remedies at both entry and promotional levels."), *cert. denied*, 112 S. Ct. 1948 (1992).

Furthermore, the uncontroverted evidence at trial established that the percentage of blacks in an untainted labor pool for BFRS jobs exceeded the percentage of blacks in the civilian labor force, 1991 Tr. 152-53, 156-57, and that the City's civilian labor force was 49.9% black in 1980. 1985 PX 23. Thus, the Court invalidated a flexible plan that established a temporary 50% annual target that was *less* than the relevant labor pool for the jobs at issue.

B. The Achievement of a Racially Balanced Workforce is not an Unconstitutional Goal as a Remedy for Egregious Discrimination.

The Eleventh Circuit held the Decree's long-term goals unconstitutional because they were intended to "achieve outright racial balancing." *BRDEL Appeal II*, 20 F.3d at 1548. As discussed *infra* at pp. 17-18, the district court properly interpreted those goals as "largely hortatory". But, even were the long-term goals designed to *achieve* a racial balance, they would be fully constitutional because the imbalance results from unlawful discrimination. This Court has clearly upheld the achievement (but not the maintenance) of a racially balanced

workforce as a constitutional remedy for discrimination. In *Paradise*, the 50% hiring and promoting was to continue until the goal of 25% representation (the approximate minority population in the workforce) was achieved at both levels. 480 U.S. at 179. In *Johnson*, this Court upheld a plan with a long term goal of achieving a workforce that reflected the representation of women and minorities in the community. 480 U.S. at 635. This Court has found that minority representation in the population provides an apt benchmark against which to measure the elimination of discrimination. *Weber*, 443 U.S. at 208; *see also Stuart*, 951 F.2d at 450-51; *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1446-47 (9th Cir. 1989), *cert. denied*, 498 U.S. 897 (1990); *Higgins v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987), *cert. denied,* 490 U.S. 1057 (1989).

Here, all numerical Decree goals for Fire Lieutenant *ended* in 1989, when the percentage of black Fire Lieutenants exceeded 28%—the percentage of blacks in the civilian workforce of the county in 1980. 1991 DX 2, DX 12. From that point forward, the City's promotion of Fire Lieutenants has been entirely free from the Decree's numerical goals. Thus, the plan is "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance". *Weber*, 443 U.S. at 208.[11]

---

[11] To support its erroneous view, the Eleventh Circuit relied on *City of Richmond v. Croson Co.*, 488 U.S. 469, 507 (1989), for the proposition that affirmative action goals cannot assume "minorities will choose a particular trade in lockstep proportion to their representation in the local population." *BRDEL Appeal II*, 20 F.3d. at 1548. *Croson* does not support the Eleventh Circuit's holding for two reasons. First, the language quoted from *Croson* concerns the basis for determining whether a substantial governmental interest exists—a proposition not in dispute here. *Croson* is silent on the question of whether, when faced with a compelling governmental interest in redressing its own past discrimination, a public employer may seek to attain a racially balanced workforce through affirmative action. Second, no such assumption was made here. The City's expert witness testified without challenge that the composition of blacks in the relevant external labor pool for BFRS jobs is greater than their representation in the civilian work pool generally. 1991 Tr. 152-53, 156-57.

II. THE ELEVENTH CIRCUIT'S DEFINITION OF WHAT "UNNECESSARILY TRAMMELS" THE RIGHTS OF NON-MINORITIES IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND UNJUSTIFIABLY LOWERS THE BURDEN OF PROOF FOR REVERSE DISCRIMINATION PLAINTIFFS.

A. The Eleventh Circuit's Error in Granting Relief Where Respondents' Only Claim of Job Entitlement was Based on an Unlawful Selection Process Undermines All Affirmative Action.

Respondents base their request for relief on the theory that, had the prior discriminatory system continued in force, they would have received the promotions they were temporarily denied by the implementation of the Decree. Even if true, respondents' theory is not a legitimate basis upon which to find the Decree unlawful. By misinterpreting the district court's finding that respondents would have been promoted absent the Decree, *see* 20 F.3d at 1542, the Eleventh Circuit has adopted a truly bizarre rule of law, under which the historical beneficiaries of race discrimination are granted an entitlement to the continuation of such treatment.

The district court recognized that, absent the Decree, respondents "would . . . have been appointed to the positions they desired and about which they here complain," *BRDEL*, 39 Fair Empl. Prac. Cas. at 1433. However, that finding *assumed continuation of the City's demonstrably unlawful procedures that excluded blacks and women.* In every reverse discrimination case, if the old discriminatory scheme were kept in place, white male plaintiffs would have received more of the positions or promotions they sought. That fact, of course, is not a bar to affirmative action. *See Johnson*, 480 U.S. 616; *Paradise*, 480 U.S. 149. Neither this Court nor any circuit court other than the Eleventh Circuit has ever held that an expectation based on prior discrimination creates any rights at all for non-minorities. *See Edwards v. City of Houston*, 37 F.3d 1097, 1115 (5th Cir. 1994) ("The union members must compete fairly for

promotions; they do not have a vested interest in continuing to receive the benefits of past discrimination.") Yet that expectation is precisely what the Eleventh Circuit endorsed when it misapplied the district court's finding.

The district court found that respondents would have been promoted if the City had continued to promote in rank order based on tests and seniority points that illegally favored non-minorities. Indeed, absent the Decrees, and had the City and the Board adhered to their past practices, no blacks would have been promoted in the BFRS to this day. Appendix to Post-Trial Brief for Defendants, November 12, 1991 at Ex. D (summarizing 1991 DX 1-2). The district court did not find that respondents would have been promoted in a non-discriminatory regime; indeed, respondents introduced no evidence whatsoever from which such a conclusion could possibly be drawn. Instead, the district court found:

> the plaintiffs have not demonstrated that any of the individual plaintiffs were at the time of their promotion demonstrably better qualified than any of the blacks certified from the same eligible register based on the results of a job related selection procedure.

BRDEL, 39 Fair Empl. Prac. Cas. at 1444 ¶ 97. Respondents did not challenge that finding in the 1991 trial or on appeal.

The 1976 trial established that the police and fire entrance examinations do not qualify as job-related selection procedures. *Ensley Branch*, 14 Fair Empl. Prac. Cas. 670. The Eleventh Circuit affirmed that finding and this Court did not review it. 616 F.2d 812 (5th Cir.), *cert denied*, 447 U.S. 1061 (1980). At the 1979 trial, the United States and private plaintiffs submitted a great deal of uncontroverted evidence proving that many of the tests and other selection devices used by the Board and City were unlawful. *See generally* 1979 PX 60, DX 63. In 1985, the district court explicitly found that higher scores on the Board's examinations did not prove superior qualification for hiring or promotion, because the examinations had not been proved to be job-related and because respondents had failed to demonstrate they were better qualified than the black promotees, *BRDEL*, 39

Fair Empl. Prac. Cas. at 1447 ¶¶ 144-148; the district court specifically rejected each of the measures proposed by respondents to prove their superior qualifications. *Id.* at 1438-1444 ¶¶ 24-97.

The Eleventh Circuit's conclusion that respondents' "failure to be promoted" constitutes unnecessary trammelling rests on the erroneous assumption that respondents would have been promoted in a nondiscriminatory system. Respondents cannot base a claim of reverse discrimination on the premise that the City and the Board would continue to discriminate in their favor. This Court should grant *certiorari* to correct the Eleventh Circuit's error in accepting that rationale and to re-affirm what seemed obvious prior to the Eleventh Circuit's ruling: reverse discrimination plaintiffs cannot invalidate affirmative action programs by proving merely that they would have been promoted if discrimination in their favor were continued.

B. A Slight Promotional Delay Does Not Unnecessarily Trammel the Rights of Non-Minorities and is Narrowly Tailored.

When evaluating whether race-conscious employment measures by a public employer are narrowly tailored, a court must consider "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Paradise*, 480 U.S. at 171 (citing *Sheet Metal Workers*, 478 U.S. at 481, 486). On four occasions, the district court has conducted that balancing and concluded that the grave need for swift affirmative action by the City far outweighed the relatively minor disruption to the expectations of nonminorities.

In 1981 the district court found: "The goals and quotas here under attack are well within the limits upheld as permissible in these decisions. First, they do not preclude the hiring or promotion of whites and males even for a temporary period of time."

Jefferson County, 28 Fair Empl. Prac. Cas. at 1836. It reiterated in 1985:

> Nor are the interest[s] of whites trammelled by the Decree. Since the entry of the Decree, some have been promoted immediately upon certification, others after only a delay, and those not promoted have had or will have an opportunity to compete as each new exam is given and an eligible register (which is valid for only a year) is created.

BRDEL, 39 Fair Empl. Prac. Cas. at 1437 ¶ 14. In modifying the Decree in 1991, the district court concluded that the Decree's long-term goals were "largely hortatory". *Jefferson County*, No. CV 75-P-666-5 (May 21, 1991) at A177.

Consistent with that interpretation, after receiving evidence of the Decree's actual operation and the alleged burden on nonminorities, the district court held that the Decree did not trammel the rights of nonminorities and was narrowly tailored:

> [The 1985] findings show that the effect on third parties, specifically the white firefighters complaining of racial discrimination in this case, is an acceptable burden. There were no provisions to use layoffs as a means for favoring junior black employees over more senior white employees, nor was there an absolute bar to promotions for white Department members, since half of the promotions would be whites. *See Johnson*, [480 U.S. at 631-32].

Bennett, 806 F. Supp. at 931. After carefully evaluating the factors outlined in *Paradise*, the district court concluded: "These factors, applied to the facts of this litigation, show that the decree is limited and tailored to the relief necessary to overcome the employment effects of past discrimination by the City." *Bennett*, 806 F. Supp. at 929.

In ruling that a short delay in promotion trammelled the rights of respondents, the Eleventh Circuit disregarded clear Supreme Court precedent and replaced the actual operation of the Decree's goals with its own theoretical discussion based on abstract rhetoric that ignores this Court's decisions and gives

no deference to the district court's findings.[12] The Eleventh Circuit made no attempt whatsoever to conduct the balancing required by *Paradise* and *Sheet Metal Workers,* ignoring both the desperate need for swift affirmative action in Birmingham and the *actual effects* of the Decree on nonminorities. Indeed, no other court has ever held that promotional delays—however great—constitute unnecessary trammelling; the courts have consistently reserved that stigma for plans requiring the discharge or layoff of nonminorities.

The following facts are undisputed. From the entry of the Decree until the 1991 trial, the BFRS had promoted 51 blacks and 93 whites.[13] Indeed, nearly 80% of the white males who would have been promoted in the BFRS absent the Decree[14]

---

[12] "[A]ppellate courts must constantly have in mind that their function is not to decide factual issues *de novo*"; an appellate court should not "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Here, deference to the district court is particularly important because, for more than 20 years, a single district court judge has presided over the initial discrimination lawsuits brought by the United States and private plaintiffs, the entry of the Decree, the reverse discrimination lawsuits and the Decree modification proceedings. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 765 (1992) (O'Connor, J. concurring) ("Our deference to the District Court's exercise of its discretion is heightened where, as in this litigation, the District Court has effectively been overseeing a public institution over a long period of time . . . we accordingly owe substantial deference to 'the trial judge's years of experience with the problem at hand'" (quoting *Hutto v. Finney*, 437 U.S. 678, 688 (1978))).

[13] We count an individual who has earned two successive promotions as two "persons" or two "white males", as the case may be. The statistics concerning delay in BFRS promotions are based on 1991 DX 1-2.

[14] For purposes of this discussion, "promoted absent the Decree" assumes that the City continued to hire and promote based upon rank order certification resulting from a combination of existing tests and seniority points—an admittedly unlawful procedure, not demonstrably job-related and fraught with adverse impact against blacks. Likewise, the calculations of "delay" measure the difference between what happened under the Decree and what would have happened *had the discriminatory system been left in place*

were in fact promoted. More than half were promoted with no delay at all, and only 15% had to sit for an additional examination before being promoted. As of the 1991 trial, only fourteen white males who would have been promoted absent the Decree had not yet been promoted.[15] Thirteen of those, however, would have been promoted (absent the Decree) only on the most recent exam given for the position sought.

The average Decree-based delay of all white males who have taken, passed, and scored well enough on promotional exams in the BFRS to be promoted strictly according to rank order is approximately seven and one-half months. White male candidates for Fire Captain have been delayed an average of approximately five and one-half months, and white male candidates for Fire Lieutenant have been delayed an average of approximately nine months.

Promotional delays as slight as those involved here simply cannot be said unduly to trammel the "rights" of white males, particularly because even those "delays" are based on the assumption that discrimination in favor of white males would continue—to which they have no "right". Furthermore, the Eleventh Circuit's holding cannot be squared with this Court's prior decisions.

Remedial affirmative action may lawfully impair the interests of nonminorities:

> As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. When effectuating a

---

intact. It would be a serious mistake to assume that those white males whose promotions have been delayed had any entitlement to earlier promotion, or that the "delay" actually measures the burden borne by white males.

[15] Seven other white males were deemed unqualified by the BFRS Promotional Review Board (whose decisions are made without regard to the Decrees), and five others did not score well enough on the most recent promotional exam to be promoted based strictly on rank order (thus, as of the time of the trial, they were not presently eligible for promotion for reasons unrelated to the Decree).

> limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible.

Wygant, 476 U.S. at 280-281 (internals citations omitted). Even preferring less qualified minorities over more qualified nonminorities (of which there is no proof here) is perfectly legal:

> In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

Id. at 282-83 (emphasis omitted).

For example, in *Weber*, this Court held that the reservation for blacks of 50% of the openings in a training program until a racial balance was achieved did not unnecessarily trammel the interests of the white employees.

> The plan does not require the discharge of white workers and their replacement with new black hirees. Nor does the plan create an absolute ban to the advancement of white employees . . .[it] is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

443 U.S. at 208 (citations omitted).

In *Johnson* this Court upheld a plan which, by allowing sex to be one of the factors in making a promotional decision, may have resulted in the denial of a promotion to the petitioner (and almost certainly resulted in the denial of a promotion to some male). This Court approvingly noted that even though promotional opportunities may have been delayed, the plaintiff in that case "retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions." 480 U.S. at 638.

Similarly, in *Paradise*, this Court held that a promotional goal "only postpones the promotion of qualified whites . . . . Denial of a future employment opportunity is not as intrusive as loss of an existing job, and plainly postponement imposes a lesser burden still." 480 U.S. at 183 (internal quotation marks and citations omitted).[16]

The Eleventh Circuit's characterization of the 50% Fire Lieutenant interim goal as a "rigid, arbitrarily selected quota", *BRDEL Appeal II*, 20 F.3d at 1543, ignores this Court's decisions, the flexibility built into the Decree and the City's actual promotional practices under the Decree. The Eleventh Circuit interpreted the Decree as follows:

> when the plan was created, the City employed 42 black firefighters and 411 non-black firefighters. The decree set aside half of all future promotions to fire lieutenant for those among the 42 black firefighters who became Board-certified as eligible. By virtue of the rigid manner in which the City has used race to determine promotions under the decree, 42 black firefighters, because of their race, gained an exclusive claim to half of all fire lieutenant promotions made under the plan, but lost any possibility of competing for the other half. On the other hand, the remaining 411 non-black firefighters saw the number of promotions to which they might aspire, absent the consideration of their race, cut from 100% to half of all lieutenant promotions.

---

[16] The Eleventh Circuit itself in *Howard v. McLucas* held that when "the [promotional] relief does not prevent white employees from being promoted . . . [and] [w]hite employees are at most delayed from receiving a promotion to a limited number of specific positions" the rights of white employees are not "trammelled". 871 F.2d 1000, 1009 (11th Cir.), *cert. denied*, 493 U.S. 1002 (1989). *See also Higgins*, 823 F.2d at 360 ("[P]romotion guidelines are even less intrusive than hiring goals. Like hiring goals, promotion guidelines visit a minor burden on non minority employees. But unlike hiring goals, promotion guidelines do not require that an individual bear the burden of past discrimination to the extent that he or she is denied a livelihood.").

BRDEL Appeal II, 20 F.3d at 1542 (internal citation omitted). That interpretation is unsupported by the findings, by any contention that the contrary findings of the district court were clearly erroneous, or by any record evidence.

First, the 50% goal does not require that *any* positions be set aside for blacks or whites. Instead, every annual goal, including the 50% goal for Fire Lieutenant, is explicitly made "*subject to the availability of qualified black applicants*", Decree ¶ 6 (emphasis added), and compels the City only to "attempt to meet" it. *Id.* Regardless of the Fire Lieutenant goal or any other goal, the Decree does not "require[] the City to hire unnecessary personnel, or to hire, transfer or promote a person who is not qualified". *Id.* at ¶ 2. If the City does not need more Fire Lieutenants, as in 1984, none are promoted. 1991 DX 2. *See Paradise*, 480 U.S. at 177-78 (plan flexible because promotional requirement waived either if no qualified black candidates available or when promotions unnecessary or not economically feasible).

Second, the Decree was not implemented in the wooden manner imagined by the Eleventh Circuit, in which every other Lieutenant promotion went to a black Firefighter. The 50% Fire Lieutenant goal was in effect for nine calendar years, expiring early in 1989. 1991 DX 12. In only *two* of those years were promotions to Fire Lieutenant split evenly between blacks and whites. In *four* years the City fell short of the 50% annual goal—*without consequence*. 1991 DX 1-2. The evidence shows, and the district court found, that the goals were not rigidly applied.[17] In fact, from the entry of the Decrees until the 1991 trial, 95 of the 145 BFRS promotions (65%) went to white males. White males accounted for 60% of the Fire Lieutenant promotions, 72% of the Fire Captain promotions, and 91% of the Battalion Chief promotions. 1991 DX 21-23; 1985 DX

---

[17] For example, in 1983, the City made three sets of Fire Lieutenant promotions but did not "woodenly" adhere to the 50% annual goal: one white man was promoted January 22, three white men were promoted March 19, and two white men and three black men were promoted August 6. 1991 DX 2. No opening was *ever* designated as "for whites" or "for blacks".

2214-2215. Thus, the record contradicts the Eleventh Circuit's findings that "[i]f four fire lieutenant positions are open, two of those will be filled by blacks and two by non-blacks", and that "no non-black employee can compete for the [] openings designated for blacks". *BRDEL Appeal II*, 20 F.3d at 1535.[18]

The record evidence of the Fire Lieutenant promotions under the Decree proves that the 50% goal in fact operated as a flexible goal, not a "rigid quota". Even if there were contrary record evidence—which there is not—the Eleventh Circuit is not free to ignore the district court's factual findings and review the record *de novo*. *Anderson*, 470 U.S. at 573.[19]

Third, the Eleventh Circuit disapproved of the 50% goal because, in its view, that goal lasted "indefinitely": the court contrasted it to the decree approved in *Howard*, 871 F.2d 1000 which "evaporated after . . . 240 promotions were made". *BRDEL Appeal II*, 20 F.3d at 1547. In fact, the 50% Fire Lieutenant goal expired in March 1989—five years *before* the Eleventh Circuit's decision—when the long-term goal was met; less than eight years after it took effect; and after only 39 blacks had been promoted to Fire Lieutenant. 1991 DX 2 and DX 12. If, as suggested by the Eleventh Circuit, the Decree had set a

---

[18] Likewise, the 42 then-incumbent black Firefighters discussed by the Eleventh Circuit were not the sole beneficiaries of the 50% goal; many black Firefighters hired after entry of the Decree benefitted as well. Indeed, Firefighters of both races hired after entry of the Decree were promoted to Fire Lieutenant while the goal was in effect, and Firefighters of both races hired prior to the Decree's entry were not promoted during that time. 1991 DX 2; 1985 DX 1431.

[19] The Eleventh Circuit implied that instead of the 50% goal, a promotion rate of twice the representation of blacks in the entry level position would have been lawful. *BRDEL Appeal II*, 20 F.3d at 1543. Assuming rigid adherence to that goal, the Eleventh Circuit's suggestion would have resulted in the promotion of 34 blacks to Fire Lieutenant between 1981 and 1989, instead of the 39 actually promoted under the 50% goal. *See* 1991 DX 1-2 and Def. App. at Ex.C. The distinction between the 50% rate of promotion and the rate tied to the entry level work force is meaningless. The promotion of five additional blacks cannot convert lawful promotions into unconstitutional trammeling.

goal equal to black representation in the pool of Firefighters, *BRDEL Appeal II* 20 F.3d at 1543, only 16% of the Fire Lieutenants would have been black in 1989 and the goal would have continued far into the future.[20] Thus, the acceleration of the short-term goal hastened the termination of affirmative action; although "indefinite", the conservatively set long-term goal was quickly met, causing prompt expiration of both. Furthermore, the district court has exercised continuing supervision over the Decrees—modifying, terminating or reducing many of the goals in 1991—and is likely to continue to do so in the future. *Jefferson County*, No. CV 75-P-666-S (May 21, 1991), A166; *United States v. Jefferson County*, No. CV 75-P-666-S (N.D. Ala. entered September 25, 1991), reprinted in the Appendix at A181; *Ensley Branch,* 31 F.3d 1548. That continuing supervision also mitigates any "indefiniteness" in the goals' duration.

Given the undisputed facts concerning the Decree's actual operation—facts utterly ignored by the Eleventh Circuit—the Decree cannot be said to trammel unnecessarily the rights of white males. Here, no white males have been fired, demoted or laid off. They have been forced to accept only a slight delay in what might have happened to them even if the City and the Board had continued to discriminate in their favor. Thus, the Decree, including the long-term and interim percentage goals, has not unduly trammelled the rights of white males and is well within the range of remedial affirmative action previously approved by this Court.

---

[20] Tying the Fire Lieutenant promotions to the Firefighter pool would have had a domino effect: instead of having nine black Fire Captains (26%) and one black Battalion Chief (7%) in 1989, Birmingham would have had only two black Captains (6%) and no black Battalion Chiefs (0%). *See* 1991 DX 1-2; Def. App. at Ex. C.

C. Narrow Tailoring Does Not Require an Employer to Attempt Slower, Less Effective Remedies Rather than Effective Remedies that Terminate Sooner.

The Eleventh Circuit invalidated the Decree in part because it held that "[w]here relief is not provided to identified victims of discrimination . . .race neutral alternatives should be considered before a government implements an affirmative action plan". *BRDEL Appeal II*, 20 F.3d at 1545-46.[21] Here, however, the record indisputably establishes the City's broad consideration of alternatives.

The district court explicitly found that, prior to negotiating a settlement of the discrimination litigation, the City had considered and attempted a variety of types of affirmative action, and that those mechanisms had been largely unsuccessful. *Bennett*, 806 F. Supp. at 929-30; *see Jefferson*

---

[21] To the extent the Eleventh Circuit's decision rests on a heightened threshold for consideration and trial of alternatives if the relief does not benefit specifically identified victims of discrimination, it is contrary to established precedent. *See Local 93, Int'l Ass'n. of Firefighters v. City of Cleveland*, 478 U. S. 501, 516 (1986) ("voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination"); *see also Paradise*, 480 U.S. at 166; *Sheet Metal Workers*, 478 U.S. at 480. Indeed, the Eleventh Circuit's attempt to distinguish its own earlier precedent, *Howard*, 871 F.2d 1000, as a case in which a consent decree "was intended to provide specific relief to victims of past discrimination", not only exposes the Eleventh Circuit's adherence to a principle rejected by this Court, but also is wholly mistaken. The promotions in *Howard* were not actually awarded to victims of past discrimination; instead, the number of promotions awarded was determined by statistical evidence which estimated the number of victims of past discrimination. *Howard v. McLucas*, 671 F. Supp. 756, 762-763, *aff'd*, 871 F.2d 1000 (11th Cir.), *cert. denied*, 493 U.S. 1002 (1989). Here, unrefuted statistical evidence established that, absent discrimination, more than 28% of BFRS Fire Lieutenants would be black. 1991 Tr. 149-50, 151-53, 156-57.

County, 28 Fair Empl. Prac. Cas. at 1838.[22] Indeed, only after the district court found the entry-level fire and police tests unlawful and ordered the Board to replace rank-order certification with certification of blacks for Firefighter in proportion to the number of black applicants did the City make any progress—and then only at the entry level. *Ensley Branch*, 14 Fair Empl. Prac. Cas. 670. The Eleventh Circuit approved that relief. 616 F.2d 812.

Similarly, the City sought to convince the United States and private plaintiffs to consider and accept less restrictive alternatives while negotiating the terms of the settlement. In some instances its efforts were successful, as with use of the county labor pool figure (28%) for the long-term goals rather than the citywide figure (49.9%), 1991 DX 31 at 10 ¶ 6B, DX 33 at 3 ¶ 5; 1991 Tr. 58-59, 61-64, 80-81; Decree ¶ 5, and the City's insistence that all Decree goals explicitly be limited by the availability of qualified applicants. Decree ¶¶ 5-8, 9(b), 10(b); *see generally id.* at ¶ 14. However, the United States and private plaintiffs did not always agree with the City's efforts to reduce relief, as with the City's attempt to scale back the 50% interim goals to 35%. 1991 Tr. 58-59, 61; 1991 DX 31 at 10 ¶ 6a, DX 33 at 4 ¶ 6.

---

[22] For example, following a study in the early 1970's, evidencing employment discrimination against blacks, the City adopted an affirmative action ordinance. 1991 Tr. 96-98. Consistent with the ordinance, departmental heads were required to submit annual plans to improve minority hiring. 1991 PX 12 at 75. However, the results achieved by those plans were woefully inadequate. *Id.* at 81. Likewise, for a decade or more prior to the Decree's adoption, the Board attempted a variety of affirmative action measures, including: advertising job vacancies in the mass media specifically targeted to the black community, 1979 Tr. 697, 700; elimination of application fees, medical examination fees, voter registration and residency requirements to encourage minority applications, *id.* at 699; recruiting drives directed at predominately black schools, *id.* at 700; distribution of job announcements to predominantly black civic and religious organizations, *id.*; and adoption of a procedure by which the Board would provide hiring authorities with enhanced certification lists including qualified lower-ranking minority candidates. *Id.* at 709-10. The Engineering department also made efforts to recruit blacks and women, 1979 PX 38 at 28-33.

Unable to dispute the City's consideration of alternatives, the Eleventh Circuit transformed that requirement into a holding that if less restrictive means might theoretically have provided some relief from past discrimination, the City could not constitutionally do more. Specifically, it ignored the fact that the increase in black representation from 1.89% to 9.3% in three years resulted from the district court's order requiring selective certification for entry-level Firefighters, and instead used that increase to justify its finding that "alternative measures designed to increase black representation in the fire lieutenant ranks were feasible." *BRDEL Appeal II*, 20 F.3d at 1546. The district court had made a factual determination that those court-ordered measures were not effective. The Eleventh Circuit disagreed, believing that some voluntary version of those measures could be more effective, and rejected the district court's findings as clearly erroneous.

The Eleventh Circuit's holding contravenes this Court's decisions in several ways. First, the Constitution does not require that relief provided in a racial discrimination case be the absolute minimum to redress past discrimination. This Court has not "required remedial plans to be limited to the least restrictive means of implementation." *Paradise*, 480 U.S. at 184 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring)); *see also Stuart*, 951 F.2d at 455 (showing that earlier efforts to produce fair tests or reduce the effect of seniority on promotion have failed is sufficient consideration of alternative remedies).

Second, in essence, the Eleventh Circuit's holding is that the City must act slowly and over a long period of time instead of quickly and briefly. As discussed *supra* at pp. 2-8, the City was obligated to act to redress its own discrimination in hiring, and could do so until the vestiges of that discrimination were eradicated. The City could well have kept affirmative action in place until more than 50% of the BFRS was black, based on the relevant labor pool. Instead, the Decree continues affirmative action only until 28% is reached. The Eleventh Circuit's various "less restrictive" alternatives are merely slower alternatives that would have to be kept in effect longer. Establishing a

constitutional preference for such measures contravenes this Court's decisions in *Paradise*, *Weber* and *Sheet Metal Workers*, by failing to recognize that the 50% goal is "not itself the goal . . . but rather the speed". *Paradise*, 480 U.S. at 179. Here, where the promotional "delay" suffered by nonminorities is demonstrably negligible, *see supra* at pp. 19-20, neither the constitution nor Title VII favors slow, protracted relief over accelerated relief terminating more quickly.

Third, whatever the merit of the Eleventh Circuit's position, it is wholly inappropriate when applied to judicially approved and supervised settlements of discrimination litigation. If, in settling a discrimination lawsuit, the defendant is compelled to agree only to the absolute minimum relief that might make some difference, plaintiffs would have no incentive to settle such litigation. That result itself contravenes Title VII, which strongly favors voluntary employer action over litigation. *Weber*, 443 U.S. at 204 (Title VII intended as a "catalyst" for employer efforts to eliminate vestiges of discrimination); *Johnson*, 480 U.S. at 630-33.

Conclusion

For the foregoing reasons, the petitioners respectfully request this court to grant *certiorari* to review the decision of the Eleventh Circuit.

February 22, 1995

Respectfully submitted,

ROBERT D. JOFFE
Counsel of Record

Richard T. Seymour
Sharon R. Vinick
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1450 G Street, NW
(Suite 400)
Washington, DC 20005
(202) 662-8350

Rowan D. Wilson
Michelle K. Jacobs
Karin J. Dell'Antonia
CRAVATH, SWAINE &
MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Susan W. Reeves
714 29th Street South
Birmingham, AL 35233
(205) 322-6631

Counsel for Petitioners
John W. Martin, *et al.*